2009

Salt Lake City Corporation v. Big Ditch Irrigation Company, James Garside, J L.C., Ryan Litke : Brief of Appellant

Utah Court of Appeals

IN THE SUPREME COURT

OF THE STATE OF UTAH

SALT LAKE CITY CORPORATION, Plaintiff-Appellee, vs. BIG DITCH IRRIGATION COMPANY, a Utah nonprofit corporation; JAMES GARSIDE; J L.C., a Utah limited liability company; and RYAN LITKE, Defendant-Appellant.	Case No. 20090757

BRIEF OF SHAREHOLDER APPELLANTS (JAMES GARSIDE, J L.C., and RYAN LITKE)

APPEAL FROM THE ORDER AND FINAL JUDGMENT OF THE HONORABLE ROBIN W. REESE

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LIST OF PARTIES

In addition to the parties listed in the case heading, **Layne Downs**, who was a Big Ditch shareholder at the time, was listed as a defendant but subsequently dismissed.

Evan Johnson is not a party, but was the principal shareholder of J L.C., a party.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under Utah Code Ann. § 78A-3-102(3)(j).

ISSUES PRESENTED

a. Whether the district court erred in failing to dismiss claims against various shareholder defendants ("shareholders") who were merely shareholders in the parent entity and key defendant, Big Ditch Irrigation Company ("Big Ditch"). Grant or denial of motion to dismiss is reviewed for correctness.[1] This issue was preserved below at R. 170-84.

b. Whether the district court erred in failing to dismiss claims against various shareholder defendants who had no pending counterclaims against Salt Lake City ("SLC"), even

[1] *Mack v. Utah State DOC*, 2009 UT 47, ¶ 15, 221 P.3d 194.

though the district court stated that existing counterclaims were the basis for retaining them in the suit. Correlatively, whether the district court erred in failing to correct its memorandum decision once the shareholders clarified, in a motion, that they were not asserting such counterclaims. Grant or denial of motion to dismiss is reviewed for correctness.[2] This issue was preserved below at R. 170-216, 1047-81, 1172-92.

c. Alternatively, if the shareholders were deemed to be bringing counterclaims, whether the district court erred in dismissing the antitrust counterclaim by failing to properly assess the legal adequacy of the counterclaim, and whether the district court misapplied relevant statutory and common law immunity to SLC, which was alleged to be an aggressive and improper market participant. This decision is reviewed for correctness.[3] This issue was preserved below at R. 170-84, 202-16.

d. Whether the district court improperly denied the shareholders' motion for a stay pending discovery under Rule 56(f) in the face of SLC's motion for summary judgment. Denial of a Rule 56(f) motion is reviewed for abuse of discretion.[4] This issue was preserved below at R. 392.

e. Whether the district court erred in refusing to dismiss the shareholder defendants after SLC's slander of title claims against them were dismissed, and based on SLC's contention that it could continue to sue the shareholders for unresolved inchoate claims that the

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[2]*Mack v. Utah State DOC*, 2009 UT 47 at ¶ 15.

[3]*Id.*

[4]*Mast v. Overson*, 971 P.2d 928, 931 (Utah Ct. App. 1998), *cert. denied*, 982 P.2d 88 (Utah 1999).

shareholders might someday bring against SLC (but were not being asserted in the instant suit). This is a denial of a motion to dismiss and is reviewed for correctness.[5] This issue was preserved below at R. 5369-86.

DISPOSITIVE AUTHORITIES

Utah Code Ann. §§ 73-3--3 and -3.5 are attached in the Addendum, together with other relevant authority.

STATEMENT OF THE CASE

A. Nature of the Case. This is an appeal from the denial and grant of multiple motions for summary judgment in a civil case.

B. Course of Proceedings and Disposition Below.

SLC commenced this case by filing a complaint against Big Ditch and four Big Ditch shareholders. R. 1. SLC and Big Ditch had executed a water exchange contract in 1905. The complaint alleged that Big Ditch and shareholder J L.C. had wrongfully filed change applications on its contract water; that, as the water's owner, SLC could veto any change application; that Big Ditch and J L.C. had slandered SLC's title by filing the change applications; and that the named shareholders had "challenged" SLC's "legally protected interests."

Big Ditch and the shareholders filed an answer and counterclaim. R. 69. The counterclaim alleged, *inter alia*, breach of contract and antitrust violations based on SLC's disproportionate and illegal role as a water market player. SLC filed a motion to dismiss the

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[5] *Avila v. Winn*, 794 P.2d 20, 22 (Utah 1990).

antitrust counterclaim. R. 100. The shareholders filed a counter motion for summary judgment for failure to state a claim. R. 167. SLC had not yet responded to the counterclaim.[6]

The shareholders' counter motion was based on their shareholder status–the fact that they were legally incapable, as mere shareholders of SLC's exchange partner Big Ditch, of committing the malfeasance SLC alleged.

While SLC's motion was pending, and before SLC responded to the appellants' counterclaim, the appellants amended their counterclaim and answer as a matter of right on October 25, 2007 under Rule 15(a) of the Utah Rules of Civil Procedure. R. 251. The shareholders dropped their counterclaims, and Big Ditch made changes to its allegations.

The district court granted SLC's motion to dismiss on October 30, 2007. R. 272. This ruling was based on the original, not the amended, counterclaims. The district court stated that the "defendants" had failed to sufficiently allege any antitrust claims, although only one defendant, Big Ditch, remained as a counterclaimant. The district court deemed deficient the original counterclaim, but did not address the amended counterclaim. The district court also denied the shareholders' motion to dismiss, R. 277, again relying on the original, not the amended, counterclaims.

Big Ditch and the shareholders then filed motions addressing the status of the docket at the time of the district court's October 30, 2007 ruling.[7] R. 1047-1192. The gist of the motions

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[6]SLC finally did so on December 3, 2007. R. 343.

[7]In the interim the defendants filed a motion to dismiss SLC's slander of title claims, which the district court granted on September 30, 2008. R. 4634. None of the parties have appealed this decision.

was that the district court had misread the docket, and that it should either reinstate various claims wrongfully dismissed, or declare that it lacked the power in the first instance to dismiss claims no longer pending before it.

The motions were logically related and internally cross-referenced, with some being made only in the alternative. *See, e.g.* R.. 1051 n.2, 1052 n.3, 1083 n.1, 1086 n.1, 1110-11, 1175 n. 5. Ultimately the district court denied the motions, stating with respect to the shareholders that they continued to "pursue" the antitrust claims up until the time the October 30, 2007 decision was rendered, even though the shareholders had dropped their counterclaims prior to that ruling. R. 2946.

On September 30, 2008, the district court dismissed SLC's Slander of Title claims against all parties, including the shareholders. R. 4634.

On October 27, 2008, the district court denied a motion for protective order filed by J L.C. R. 4838. Part of the basis for the motion for protective order was that with the dismissal of the slander of title claims, SLC no longer had any remaining claims against the shareholders. The district court disagreed, stating that SLC's "pleadings" still named the shareholders as defendants. R. 4839.

Accordingly, on December 2, 2008, the shareholders filed a motion for summary judgment, arguing that SLC's causes of action no longer concerned the shareholders. R. 5369. The district court denied this motion on July 6, 2009, stating that the shareholders had conceded SLC's position by filing their motion for summary judgment. R. 6339.

C. Statement of Facts. In 1905 Big Ditch and SLC entered into a water exchange contract. R. 19. Big Ditch transferred to SLC the right to divert and use the water it had been taking from Big Cottonwood Creek. In exchange, SLC would timely deliver a fixed amount of water to Big Ditch, tied to the measured flow in the creek. The exchange gave SLC high quality canyon water and gave Big Ditch a more constant flow of water at Big Ditch's diversion point from sources of SLC's choosing. Over the next thirty years SLC executed 31 similar exchange contracts with other companies. R. 5310.

In 1914, *The Progress Co. v. Salt Lake City*[8] adjudicated a dispute between SLC and the Progress Company. The Progress Company claimed that it had the right to divert water from the creek for a power plant, and challenged SLC's right to take water from the creek under the exchange agreements. A decision was rendered for SLC and its exchange partners. It fixed the amount of water SLC (on behalf of Big Ditch) could divert from the creek, and in turn recognized that SLC could take this water "by virtue of" the 1905 contract. R. 28.

In the intervening decades, SLC either never claimed or eschewed title to Big Ditch's contract water. R. 1383-92. During this time Big Ditch's service area gradually urbanized, and, while SLC continued to deliver Big Ditch's full contractual amount through the diversion structure, Big Ditch turned less water into its conduit. SLC also acquired water rights exceeding its contemporary or projected needs and leased these as "surplus." R. 6302. It also engaged in aggressive practices to control and eventually eliminate its exchange partners, R. 4274-75,

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[8]Civil No. 8921 (Third Dist. Utah 1914).

characterizing these water users as "dangerous" and "sinister" who would need to respond to SLC's "muscle." R. 6289-90.

In 2006 Big Ditch filed a number of administrative change applications to change points of diversion of its exchange water for the benefit of a number of shareholders. SLC protested and then, in 2007, sued Big Ditch and the Big Ditch shareholders for filing the change applications. SLC claimed that Big Ditch had no residual entitlement to file such applications, and further claimed that the shareholders violated their legal obligations to SLC.[9]

SUMMARY OF ARGUMENT

The shareholders are merely members of SLC's exchange partner, Big Ditch. They have no privity with, nor duty toward, SLC. They can no more be liable to SLC than can an owner of Ford stock be liable for a pick-up rollover. Yet SLC claimed the shareholders were "challenging" SLC's "legally protected interests." The shareholders moved to dismiss this vague and incognizable attempt to harass the shareholders, but the district court denied the motion.

One of the reasons the Court did so is that the shareholders were allegedly countersuing SLC for antitrust. A countersuit cannot validate an improper suit. Apart from this error, the district court did not realize that the shareholders had dropped their claims against SLC before the district court ruled. This eliminated countersuit as a basis for retaining the shareholders. (The shareholders tried to allow the trial court to remedy this error with a motion to reconsider; it was denied).

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[9]The balance of the facts are in the Course of Proceedings and Disposition Below.

Even if the district court properly concluded that the shareholders continued to pursue SLC at the time the district court ruled, the claims the shareholders had brought were sufficient to survive dismissal. They properly pled antitrust violations, and SLC could not defeat them with a municipal status defense. Subsequent evidence adduced in the case substantiated the antitrust allegations.

Toward the end of the case, after the district court dismissed SLC's meritless slander of title claims, the shareholders claimed again that they were not proper parties, as they had no power to file change applications: the law did not empower them to commit the breach or tort SLC alleged. The district court regarded this lack of power argument as a concession, and entered judgment for SLC. This was error.

ARGUMENT

Introduction. The shareholders should not be here. This Court ruled in *East Jordan Irrigation Co. v. Morgan*[10] that shareholders cannot file change applications. With loss of privilege comes loss of responsibility, and loss of duty toward those who may be affected by that responsibility.

Here, Big Ditch is the only entity that could be empowered to file a change application. That privilege is the subject of a legitimate dispute Big Ditch has with SLC. The shareholders have no such dispute.

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[10]*East Jordan Irrigation Co. v. Morgan*, 860 P.2d 310 (Utah 1993).

This does not mean the shareholders do not enjoy benefits from owning shares in Big Ditch. They do. *Strawberry High Line Canal Co. v. Bureau of Reclamation*[11] states that companies are to protect their shareholders' rights to enjoy their water use. (The district court stripped Big Ditch of its ability to protect shareholders by declaring that Big Ditch cannot file change applications when its shareholders so request.)[12]

Inasmuch as the shareholders have the right to petition the company to file change applications, if that right is taken away, there is little the shareholders can do to enforce their diversionary rights as shareholders in the company. Yet, little as those rights were regarded by the district court, there is not, and never was, anything they can do against SLC, a party with whom they have no privity. They can only look to Big Ditch, which, under *Strawberry*, is tasked with shielding and protecting the shareholders' diversion uses.

Even so, SLC has secured a judgment against the shareholders to prevent them from ever pursuing SLC. In the process, it has stripped them of many of the rights they have within Big Ditch. Given SLC's strategic plan to control, and then kill, irrigation companies, perhaps this is SLC's objective.

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[11] *Strawberry High Line Canal Co. v. Bureau of Reclamation*, 2006 UT 19, ¶ 36, 133 P.3d 410.

[12] Big Ditch's exchange contract is like any other exchange. As an example, a city with surplus tractors and a farmer with one tractor agree to exchange the use of their tractors. New laws require tractor owner's registration to operate on state roads. The city claims title to both tractors and refuses to allow the tractor now used by the farmer to be registered. The tractor can't leave the original farm, which is now urbanized. The city sues, claiming that since the tractor cannot drive on the road to be used on what distant fields are left to be farmed, then the city is entitled to keep both tractors. The farmer who helped the city now has no tractor. The city has another surplus tractor.

No matter what SLC's motives are, the district court's decision to issue a judgment against the shareholders for actions they cannot commit was error, and should be reversed.

I. THE DISTRICT COURT ERRED WHEN IT DENIED THE SHAREHOLDERS' MOTION TO DISMISS.

The district court ruled that the shareholders, by virtue of their pursuing SLC with counterclaims, could not claim that they were immune from suit by SLC. The court also ruled that the shareholders could not rely only on the lack of required allegations in SLC's complaint to support their claim of immunity, and that J L.C. could not avoid being sued because it had signed the offending change applications (and had produced no evidence as to why it should be immune). R. 272.

A. The Shareholders Were Immune From Suit Based on Their Status as Shareholders.

The district court ruled that the shareholders were proper defendants, and could not rely only on the allegations in SLC's complaint to support their claim that they were not proper defendants. R. 272. The district court erred.

Generally, officers and stockholders of corporations are "not held to be in privity with their corporations and are not personally bound by judgments against those corporations."[13]

[13]*Brigham Young Univ. v. Tremco Consultants*, 2005 UT 19, ¶ 37, 110 P.3d 678, 688; *see Reedeker v. Salisbury*, 952 P.2d 577, 582 (Utah Ct. App. 1998) ("'The general rule is that a corporation is an entity separate and distinct from its officers, shareholders and directors and that they will not be held personally liable for the corporation's debts and obligations.'" (citation omitted)).

Thus, when an officer or director acts in his or her official capacity, he or she is immune from liability.[14] This is true "whether the corporation has many stockholders or only one."[15]

This "corporate shield doctrine" completely protected the shareholders from liability. The shareholders were additionally immune because they did not "have or claim [an] interest which would be affected by the" declaratory relief that SLC sought against them.[16] An "interest" under the Declaratory Judgments Act is "a substantial interest or a legally protectible [*sic*] interest in the subject matter of the litigation."[17] Based upon this definition, one court has held that a party cannot be a part of an action for declaratory relief if the party does not "own" any part of the property in dispute.[18] Therefore, the shareholders should have been dismissed because the property that is in dispute is not owned by them and they do not "have or claim [an] interest which would be affected by the declaration."[19]

Notwithstanding this strong protection of immunity, the district court ruled that the shareholders could not prove their immunity because they had cited only to SLC's complaint. Concededly, the shareholders' motion was entitled a motion for partial summary judgment when

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[14]*Reedeker*, 952 P.2d at 582.

[15]*Colman v. Colman,* 743 P.2d 782, 786 (Utah Ct. App. 1987).

[16]Utah Code Ann. § 78B-6-403(1) (the only persons that may be included in a claim for declaratory relief are those "who have or claim any interest which would be affected by the declaration").

[17]*Main Parking Mall v. Salt Lake City*, 531 P.2d 866, 867 (Utah 1975).

[18]*Anschutz Corp. v. Natural Gas Pipeline Co.*, 632 F. Supp. 445, 449, 453 (D. Utah 1986).

[19]Utah Code Ann. § 78B-6-403(1) .

it could have been entitled a motion to dismiss for failure to state a claim. But in motion practice, labels do not matter. The court looks to the substance, not form, of the relief sought to define the proper standard and remedy.[20] The motion was, in all respects, a Rule 12(b)(6) motion. The district court focused on the label, and confused the shareholders' Rule 12(b)(6) motion with a traditional motion for summary judgment supported by external documents. Yet a defense motion for summary judgment relying only on the complaint is acceptable under the rules, since it deals with the legal standards framed by the facts as alleged (which are the essence of the plaintiff's case).[21]

Here, no further evidence beyond the complaint was required: a 12(b)(6) motion, by definition, rests on the pleadings.[22] SLC failed allege how the shareholders were in any privity with it or had any duty toward it. SLC's only basis for suing Garside and Litke was that they were shareholders, officers, and/or directors of Big Ditch, which represented a threat to SLC's "legally protected interests." R. 12. This is an attack based purely on status. The district court wanted more, but the standard required no more: SLC's attack was legally insufficient. Shareholders cannot be sued simply because they are owners of a tortfeasor or breaching

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[20] *Debry v. Fidelity Nat'l Title Ins. Co.*, 828 P.2d 520, 523 and n. 9 (Utah 1992) (Consistent with the requirement that the Utah Rules of Civil Procedure be liberally construed, "the substance of a motion, not its caption, is controlling.") (citations omitted); *Armstrong Rubber Co. v. Bastian*, 657 P.2d 1346, 1347-48 (Utah 1960) ("If the nature of the motion can be ascertained from the substance of the instrument, . . . an improper caption is not fatal to that motion.") (citation omitted); *see also Papasan v. Allan*, 478 US 265 (1986) (In determining whether an Eleventh Amendment claim will be permitted the Supreme Court stated, "we look to the substance rather than to the form of the relief sought.").

[21] *See Brown v. Weiss*, 871 P.2d 552, 560-61 (Utah Ct. App. 1994).

[22] *Whipple v. Am. Fork Irrigation Co.*, 910 P.2d 1218, 1220 (Utah 1996).

corporation. SLC's claims for declaratory relief against the shareholders should have been dismissed.[23]

B. J L.C. Was Not Properly Retained as a Defendant Despite Its Signature on the Change Applications.

The district court attached special significance to J L.C.'s signature on the offending change applications. The district court inferred privity or duty from the signature, and then placed the burden on J L.C. to escape this special status. This was error.

J L.C. signed the change application solely in its capacity as a Big Ditch shareholder in an attempt to change its proportionate share of Big Ditch water as a Big Ditch shareholder. The change application was made only in Big Ditch's name and only in connection with Big Ditch water. J L.C.'s signature on the application was intended only as a convenience to Big Ditch. But for its status as a shareholder of Big Ditch, J L.C. could not have signed the change application.[24] Both Utah Code Ann. § 73-3-3.5 and this Court's decision in *East Jordan*[25] rendered J L.C. technically powerless to sign a change application by itself. That power lies solely in Big Ditch. If the district court sought evidence, it needed only to look at the statute.

Because all of J L.C.'s actions were performed solely as a product of J L.C.'s shareholder status, J L.C. enjoyed the same immunity as any other shareholder. This is true of the other

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[23]The same is true of SLC's claim that these shareholders' "actions and claims" threaten to injure SLC. R. 10. Nowhere, does SLC state what these alleged "actions and claims" are. Even if determinate, these "actions and claims" were in no way separate or independent of Garside and Litke's status as shareholders, officers, and/or directors of Big Ditch.

[24]*See* Utah Code Ann. § 73-3-3.5(2).

[25]*East Jordan*, 860 P.2d 310 (Utah 1993).

arguments SLC made below, including its argument that J L.C. (and, presumably, all other shareholders) was a phantom party to the 1905 contract and *The Progress Company v. Salt Lake City*. R. 24. The contract and *Progress* concern only SLC and Big Ditch--not J L.C. Thus, there was no reason to include J L.C. as a defendant in the action inasmuch as J L.C. had nothing to do with either the 1905 contract or subsequent court decree.

C. The Shareholders Were Not Pursuing Any Counterclaims When the District Court Ruled on Their Motion to Dismiss.

In its ruling of October 30, 2007, R. 272, the district court referred exclusively to the original counterclaim, not the amended counterclaim, which was filed nearly a week before. The most obvious evidence of this is that the district court relied on the shareholders "counterclaims" as a basis to retain them as defendants, even though the shareholders dismissed without prejudice those counterclaims in the amended answer and counterclaim, as permitted by Utah Rules of Civil Procedure 15(a) and 41(a)(1).

The fact that a party has countersued does not somehow cure a nonmeritorious cause of action. It appears that in so ruling the district court confused jurisdictional defects, which can sometimes be waived, with substantive defects, which cannot. A party may appear in an action and thereby waive a personal jurisdiction defense. In contrast, a valid counterclaim cannot breathe life into an invalid complaint. Summary judgment on the initial complaint, therefore, is not precluded by the existence of a counterclaim.[26]

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[26] *See Timm v. Dewsnup*, 851 P.2d 1178, 1180-81 (Utah 1993) (citing *Bennion v. Amoss*, 500 P.2d 512 (Utah 1972)).

In part to correct the district court's errors, Big Ditch and the shareholders jointly filed two motions on February 28, 2008, in an effort to induce the district court to consider the state of its docket when it ruled:

1. A Rule 54 Motion to Correct Memorandum Decision ("Motion to Correct") sought to clarify the district court's memorandum decision. R. 1095. The district court's use of the term "defendants" was incorrect, since the shareholder defendants were not asserting any counterclaims at the time the district court issued the decision. Only Big Ditch continued pursuing counterclaims. R. 1047.

2. A Rule 41 Motion to Dismiss Antitrust Claims Without Prejudice ("Motion to Dismiss") alternatively requested that the shareholder defendants (depending on how the district court ruled on the previous motions) have their antitrust claims dismissed without prejudice, thus simplifying the litigation and removing the preclusive effect of a dismissal with prejudice. R. 1102.[27]

While Rule 54 relief is normally discretionary, that discretion is severely limited when the reconsideration is of a legal error.[28] The district court mistakenly understood that the shareholders still were asserting claims against SLC. Eliminate those claims, and the district

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[27]The need to file motions to reconsider or correct would not have arisen had the district court accepted the appellants' cross-referencing and companioning of motions, *see, e.g.* R.. 1051 n.2, 1052 n.3, 1083 n.1, 1086 n.1, 1110-11, 1175 n. 5, and ruled on them as analytical sets rather than chronologically piecemeal. Had it done so, it is highly likely that the motions to reconsider would not have been necessary, even in the face of adverse rulings.

[28]*See Mid-Am. Pipeline Co. v. Four-Four, Inc.*, 2009 UT 43, ¶ 14, 216 P.3d 352.

court had no choice but to reverse itself. No discretion can be exercised based on a misunderstanding of the docket.

Accordingly, the appellants argued that references to the "defendants" in dismissing Count V of the Counterclaim (antitrust) dealt exclusively with Big Ditch, since it was the only remaining counterclaimant. Indeed, the district court lacked subject matter jurisdiction to adjudicate any of the shareholder defendants' dismissed claims, even if it desired to do so, since once the dismissals were effective, no case or controversy was before the Court.

Big Ditch also argued, relatedly, that it ought to be permitted to cure the defects the district court perceived in its original counterclaim by looking to the amended counterclaim that was on file when the court ruled.[29] By the time the defendants filed the motions, both Big Ditch and the shareholders had the common goal of simplifying the litigation by dismissing the antitrust counterclaims without prejudice. R. 1098. The shareholders contended that they had already done this as a matter of law.

The district court denied the motions. R. 2946.[30] While one of the motions asked the district court to review the record to correct its earlier decision, the district court persisted in relying on a nonexistent version of the record by stating that all of the defendants continued to

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[29]Big Ditch also filed a second amended counterclaim that specifically targeted the district court's concerns. R. 1109. Big Ditch argued that the court could not have ruled as it did had the second amended counterclaim been considered. This is treated in Big Ditch's brief.

[30]Big Ditch filed a Motion to Amend and a Motion to Reconsider along with the two shareholder motions. The four motions were filed together because they were analytically related. The district court did not consider the Motion to Amend in this opinion, even though it was filed together with the other three motions, and was expressly incorporated into and companioned with the motion to reconsider as either an additional or alternative basis to reinstate the antitrust claims. R. 1110-11.

"pursue" the antitrust claims up until the time of the October 30, 2007 decision. R. 2946. There is no basis for this statement. It is unclear what the district court meant by "pursue." It was certainly not actively litigated, and was dropped on October 25, 2007, by the shareholders.

The record confirms that no counterclaims by the shareholder defendants were pending at the time of the trial court's October 30, 2007 decision. Even if the pendency of counterclaims could operate to validate SLC's claims against the shareholders, those counterclaims were no longer pending. The court erred in basing its decision on the pendency of counterclaims.

D. The Antitrust Claims Were Sufficiently Meritorious to Withstand Dismissal.

If this Court rules that the original counterclaim was not as a matter of law supplanted by the amended counterclaim, the district court still erred by concluding that defendants failed to make sufficient allegations supporting their antitrust claims in the original counterclaim. In the original counterclaim, defendants alleged that SLC competed with them in the same relevant marketplace.[31] Specifically, the counterclaim alleged that SLC monopolized the water of Big Cottonwood Creek to control building and zoning in Big Cottonwood Canyon to the point of wasting Big Cottonwood Creek water (including a portion of Big Ditch's original water right); wasted other portions of Big Ditch's original water rights (upon which Big Ditch owns a reversionary right); interfered with Big Ditch's enjoyment of its contract water by meritlessly protesting Big Ditch's change applications and thereby withholding Big Ditch's exchange water; competed against Big Ditch's shareholders for Big Ditch stock; intentionally blocked Big Ditch's ability to obtain proper state water use permits in order to devalue Big Ditch stock; unlawfully

[31]After the shareholders dropped their antitrust claims, Big Ditch continued this claim, in modified and more specific form.

used Big Ditch's original water right in temporary "surplus" sales contracts to meet permanent state building water requirements; and encouraged others to block change applications like those filed by Big Ditch on behalf of the shareholders. These allegations were greatly enlarged in Big Ditch's second amended complaint, and were in large part verified by subsequent discovery and evidence adduced for other purposes.[32]

The statute allows one who is injured or is threatened with injury to bring suit. Utah Code Ann. § 76-10-919(1)(a). The allegations fit within this broad statutory mandate. The shareholders' allegations should have survived dismissal, as should have Big Ditch's (either in their first or second iteration).

Notwithstanding the district court's statement to the contrary, allegations that SLC may have acted unilaterally are not fatal to or otherwise dispositive of the antitrust claim. Instead, a

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[32] *See, e.g.*, R. 3080 (Director Hooton Memo to Mayor's Office of August 30, 1993, detailing City's domination of small water company and promise to use "Salt Lake City's watershed management muscle to deny them water" and eventually eliminate the company); R. 2974, 3072-78 (City buys up exchange partner Butler Ditch, then has company deed water to SLC; inconsistent with City's claim to title in the first instance); R. 6294 (Hooton Memorandum: City buys up and dissolves the exchange contract company Brown and Sanford Irrigation Company; "Hopefully this will begin a trend in this direction."); R. 6305 (Hooton Memorandum: City buys out exchange contract company Cahoon & Maxfield Irrigation Company); R. 6302 (Hooton Memorandum: City has been selling surplus water to 30,000 connections and 140,000 residents, including Alta ski resort and residents of Little Cottonwood Canyon); R. 499 (GRAMA response: SLC made $20 million in extraterritorial water sales in FY 2006-07); R. 501, 503 (invoices documenting approximately $400,000 per annum in surplus sales to Jordanelle Special Service District); R. 4274-75 (City watershed management plan reflects a strategy to "[a]ctively acquire stock in mutual irrigation companies with which Salt Lake city has exchange contracts . . ., develop a program by which Salt Lake City can accept donations of water stock . . . , [and] eliminate the exchanges and purchase the contracts outright."); R. 5840 (Hooton Memorandum: SLC characterizes Farr Harper Ditch's attempts to transfer water up the canyon as "sinister."); R. 6290, 6322 (Hooton Memorandum: City characterizes Silver Fork Pipeline President as "dangerous" because he threatened "to reduce the City's hold on water and influence development in the canyon.")

showing of unilateral conduct is sufficient to state a claim for violation of the Utah Antitrust Act. According to the Act, it is "unlawful for any person to monopolize, or attempt to monopolize, . . . any part of trade or commerce," regardless of whether or not there is any sort of combination or conspiracy to monopolize. Utah Code Ann. § 76-10-914(2). Although a showing of conspiracy to monopolize is one basis for bringing an antitrust claim, it is not the only basis: one may bring an antitrust claim whether or not such involves conspiratorial conduct. Indeed, a monopoly is, in its purest sense, simply an organization of *one* refusing to allow others a fair chance. As a result, the shareholders did not need to show that SLC acted in concert with another person.

E. The District Court Erred by Denying the Shareholders' Final Motion for Summary Judgment.

Midway though the case, the district court made two rulings important to the shareholders, the granting of a motion to dismiss SLC's slander claims, R. 4364, and the denial of J L.C.'s motion for a protective order. R. 4838. Together the two rulings explain the trial court's view as to why the shareholders even remained in the case: "while the Court recently granted defendant J L.C.'s Motion for Partial Summary Judgment pertaining to slander of title, SLC continues to have claims (by way of its First and Second Causes of Action) which involve defendant J L.C. and which remain pending. Indeed, defendant J L.C. remains a party to this action and is subject to discovery." R. 4839.

The pleadings did not support retaining the shareholders. The First Cause of Action did not concern the shareholders at all. As for the Second Cause of Action, it alleged that the

shareholders had "challenged" SLC's "legally protected interests" by filing change applications to use their shares outside the historic Big Ditch service area. While in and of itself failing to articulate any cognizable breach or tort recognized under Utah statutory or common law, the count was also defective because it was based on an erroneous assumption that the shareholders were capable of independently asserting ownership of either water or a right to use water separate from that of Big Ditch.[33]

As noted in Big Ditch's brief (here incorporated by reference), restricting water use by place or type violates Utah public policy, and is only permissible when the complaining party can show that the restriction protects it from prejudice or harm (such as depletion of its own water supply,[34] or violation of a bargained-for contractual right, wherein a party is compensated for abandoning its freedom to use water as it pleases). The mere fact that the shareholders petitioned the company for permission to use their shares outside the Big Ditch service area is neither a tort nor a breach, as a matter of public policy.

Moreover, a shareholder in a water company does not have ownership of the water the company owns. Rather, it may use water under a collectivized contract with the company.[35] The legislature has codified this principle in section 73-3-3.5 of the Utah Code, which specifically

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[33]As already noted, the shareholders' bringing counterclaims could not have created a liability theory against the shareholders, and, in any event, the shareholders ceased pursuing SLC.

[34]"Impairment" is an important criterion in assessing change applications. Utah Code Ann. § 73-3-3(2)(b).

[35]*East Jordan*, 860 P.2d 310 (Utah 1993).

grants only a company, and not a shareholder, the right to file a change application.[36] Since change applications can only be made by one with an entitlement to the use of water, one prohibited by the legislature from filing such an application cannot have such an entitlement.

It is impossible for one that has no entitlement the use of water to make a valid "claim" to that water. Yet, when pressed, this is the position SLC took. In attempting to clarify SLC's pleadings, its attorney stated:

> J L.C. is still a proper party to those claims because it actually filed change applications under a claim of right . . . . The City is also entitled to a declaration of whether it is in breach of contract with regard to any rights that might pertain to the J L.C. shares. Mr. Litke is a proper party as he still holds shares for what appears to be the purpose of attributing water rights to those shares and then selling them, and the City is entitled to know both whether such ownership (without the ability to irrigate lands within the Big Ditch system) carries with it the right or authority to file change applications and whether the City is in breach of contract with regard to any rights that might pertain to his shares.

R. 5382-83.

This statement misrepresents the law. First, SLC claims that J L.C. filed the subject change applications under "claim of right." Section 73-3-3.5 recognizes no such claim, and J L.C. disavowed it, wishing to comply with the law. Second, a water right cannot be "attributed" to a share. The statute and *East Jordan* show that title, and entitlement, vest with the company; the shareholder has, residually, a contractual and fiduciary relationship with the company granting it the right to request that a change application be filed on its behalf. The attribution SLC claims is not cognizable in this relationship. It is a legal fiction SLC created to justify its continued prosecution of the shareholders. Third, a shareholder cannot ever have the right or authority

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[36]Utah Code Ann. § 73-3-3.5(2) and (6).

to file a change application. This was, again, decided in *East Jordan.* Fourth, SLC's last claim really means, "We are suing the shareholders in case we breached a contract with them." SLC does not allege how it could be in privity with the shareholders, and there was no evidence that there was any contractual relationship between them and SLC. A suspicion that one might be breaching a contract is no basis for a suit.

Remarkably, the shareholders' argument that they lacked the statutory or common law authority to file change applications was viewed as a "concession" by the district court. R. 6346. There was no concession. SLC filed suit to harass the shareholders, claiming fear of a power the shareholders did not have. A party denying the power to commit a breach or tort does not amount to a concession that a tort or breach has occurred.

This is not to say that the shareholders are not sympathetic with Big Ditch's position in this appeal. To the contrary, as the shareholders' shield bearer,[37] the shareholders can only wish Big Ditch well in pursuing its goal of securing the right to file change applications.

Ultimately, SLC's objective in moving for summary judgment was to strip from the shareholders whatever residual rights they had under *East Jordan* to petition Big Ditch to file change applications. Stripping them of any status as beneficial users of water prevents them from participating in Big Ditch's corporate governance, at least as far as that governance concerns contractual or fiduciary duties concerning proper delivery of water. Perhaps SLC has plans to seize control of Big Ditch under its plan to drive exchange partners out of business.

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[37] *Strawberry*, 2006 UT 19 at ¶ 37.

R. 4274-75. Stripping away shareholders' rights to question the company's water management decisions is a means to that end.

CONCLUSION

The district court retained shareholder defendants who were powerless to wield the harm SLC claimed, and who were protected by the corporate shield doctrine. It dismissed with prejudice claims that were not even before it, misapplied the law governing those claims as a basis for their dismissal, and then, in the ultimate irony, used the claims to justify the shareholders' continuing presence in the suit. And at the end of the case, when the shareholders pointed out to the district court their inability to do what SLC claimed and asked to be dismissed, the district court treated this as a concession and entered judgment--for SLC.

SLC's objective in suing both Big Ditch and its shareholders was to ensure that Big Ditch could not file change applications, and that the shareholders would lose their right to petition Big Ditch to do so. The shareholders now have lost all access to the Utah Division of Water Rights change application process through the two district court rulings.

The district court should be reversed, with the shareholders' antitrust claim being treated as voluntarily dismissed without prejudice and the judgment in favor of SLC being vacated.

RESPECTFULLY SUBMITTED this 25th day of February 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 1 day of ~~February~~ March, 2010.

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